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No. 87-1897

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FREDERIC HABERMAN, *et. al.*,

vs. *Appellants,*

THE WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et. al.*,

Appellees

ON APPEAL FROM THE SUPREME COURT OF WASHINGTON

MOTION TO DISMISS

CAMDEN M. HALL*
STELLMAN KEEHNEL
DANIEL L. THIEME
Foster Pepper & Shefelman
1111 Third Avenue
Suite 3400
Seattle, Washington 98101
(206) 447-4400

Attorneys for Appellee
The City of Seattle

*Counsel of Record

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Appellee The City of Seattle ("Seattle") moves under Sup. Ct. R. 16.1(a) that this appeal be dismissed, on the ground that it is not within this Court's jurisdiction. The decision of the Supreme Court of Washington from which this appeal is taken is not a final judgment or decree and is therefore not appealable.[1]

STATEMENT OF FACTS

The ultimate issue on appeal here is the standard of proof that should apply at trial to Appellants' claims under

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[1] There are two appeals pending in this Court from the same Washington Supreme Court decision: *American Express Travel Related Services Company, Inc.* v. *The Washington Public Power Supply System*, No. 87-1889, and *Haberman* v. *Washington Public Power Supply System*, No. 87-1897. Because the issues related to appealability are identical in both appeals, Seattle has filed identical Motions to Dismiss in both appeals.

the Washington State Securities Act (the "WSSA").[2] The Washington Supreme Court has remanded those claims for trial under a scienter standard of proof, as required by Wash. Rev. Code § 21.20.430(7)(1987) (the "Scienter Amendment"). *Haberman* v. *Washington Public Power Supply System*, 109 Wn.2d 107, 124-47, 178, 744 P.2d 1032, 1048-60, 1075-76 (1987). Appellants ask this Court to hold the Scienter Amendment unconstitutional, so that they can proceed to trial under a negligence standard of proof instead.

This issue may be rendered moot by further proceedings in the Washington courts. For example, Appellants may succeed at trial on their WSSA claims by proving that Appellees acted with scienter. Conversely, Appellees may prevail below on the independent state ground that Appellees were not "sellers" of the bonds within the meaning of the WSSA.[3] Or these claims may be settled before trial.[4] Because of these possibilities, the decision below is not final and may not be appealed.

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[2] Wash. Rev. Code Ch. 21.20 (1987).

[3] In the opinion below, the Washington Supreme Court held that the federal definition of seller under § 12 of the Securities Act of 1933 should be applied in construing the scope of seller liability under the WSSA. *Haberman*, 109 Wn.2d at 130-33, 744 P.2d at 1051-52. One of the factual issues remanded to the trial court was whether Appellees qualify as sellers under that standard. *Id.* Last month, this Court narrowly limited the scope of persons who may be considered statutory sellers of securities potentially liable under § 12. *Pinter* v. *Dahl*, 56 U.S.L.W. 4579, 4584-88 (June 15, 1988).

[4] Appellants are members of the plaintiff class in parallel federal class action securities litigation. *In re Washington Public Power Supply System Securities Litigation*, MDL No. 551 (W.D. Wash.). Settlements of the class claims, including the class WSSA claims, have already been reached with many of the Appellees here, subject to court approval.

DISCUSSION

This appeal is brought under 28 U.S.C. § 1257 (1988), which allows for appeals to this Court of certain "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . ."

Appellants acknowledge that the Washington Supreme Court's decision is not "final" in the traditional sense. The decision remanding Appellants' WSSA claims for trial "clearly is not one that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' " *Stringfellow* v. *Concerned Neighbors in Action*, 480 U.S. ____, 107 S. Ct. 1177, 1181 (1987) (quoting *Catlin* v. *United States*, 324 U.S. 229, 233 (1945)). Appellants therefore argue that the decision "falls within one of the narrow categories of decisions that [this Court has] deemed final for purposes of review, even through the entire dispute has not yet been resolved." *Id.*

This Court has recognized four narrow exceptions to the requirement of strict finality in appeals from the state courts. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). Appellants attempt to rely on two of the exceptions from the *Cox* case, but neither applies here.

I. THE SECOND *COX* EXCEPTION DOES NOT APPLY HERE

Appellants first assert that this case falls within the second exception to strict finality that was recognized in *Cox*— cases "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of further state court proceedings." *Cox*, 420 U.S. at 480. Appellants are wrong. Their constitutional challenge to the Scienter Amendment will be mooted if they prevail at trial below, if Appellees prevail below on an independent state ground, or if these

claims are settled before trial. Thus, this is *not* a case where "the federal issue would not be mooted or otherwise affected by the proceedings yet to be had because those proceedings have little substance, their outcome is certain, or they are wholly unrelated to the federal question." *Id.* at 478.

Because Appellants' constitutional claims may be mooted by the results of trial, the single "category 2" case that Appellants have cited is not germane. *American Export Lines, Inc.* v. *Alvez*, 446 U.S. 274 (1980),[5] involved a writ of certiorari from a New York Court of Appeals ruling allowing Mrs. Alvez to assert a maritime loss of society claim. The New York court remanded for trial. The issue before this Court was whether federal maritime law allowed Mrs. Alvez to recover loss of society damages.

The question of the finality of the state court decision was not raised until oral argument. By that time, Mrs. Alvez had prevailed at trial on remand, and defendant's counsel conceded that the defendant's appeal from the trial verdict would not challenge the award of loss of society damages. Under these narrow circumstances—where the claim had been fully tried before the issue of finality was raised here, and could not be affected by further proceedings below—this Court held that the New York Court of Appeals decision fell within the second "categorical exception to strict finality." *Id.* at 277-79.

The facts are very different here. Unlike in *American Export Lines*, it is not known here whether Appellants' constitutional claims will be mooted by further proceedings below.

The constitutional issues raised here "are too important to be decided save when absolutely necessary, and are to be

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[5] This case was cited only by the Amexco/US Appellants in No. 87-1889.

avoided if there are grounds for decision of lesser dimension." *Cox*, 420 U.S. at 509 (Rehnquist, J., dissenting). The state court process may yet render review of Appellants' constitutional claims unnecessary. As a result, the second *Cox* exception does not apply to this case.[6]

II. THE FOURTH *COX* EXCEPTION DOES NOT APPLY HERE

Appellants also attempt to rely on the fourth exception recognized in *Cox*. Again, Appellants' reliance is misplaced.

Under the fourth *Cox* exception, immediate review is allowed where *both* (1) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action," and (2) "a refusal immediately to review the state court decision might seriously erode federal policy." *Cox*, 420 U.S. at 482-83. This appeal meets neither requirement.

A. Reversal Will Not Terminate The Litigation of Appellants' WSSA Claims

Reversal of the state court decision would not preclude further litigation of Appellants' WSSA claims. Reversal would "merely control[] the nature and character of . . . the state proceedings still to come," *Cox*, 420 U.S. at 483,

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[6] The Haberman Appellants, in No. 87-1897, also cite *Mills* v. *Alabama*, 384 U.S. 214 (1966). *Mills* is an example of the first *Cox* exception—cases "where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Cox*, 420 U.S. at 479. *Mills* involved a first amendment challenge to a criminal prosecution. The Alabama Supreme Court had upheld the criminal statute involved, and remanded for trial. The defendant conceded that he had no defense if the statute was constitutionally sound. Thus the outcome on remand was preordained, and appeal was appropriate. *Mills*, 384 U.S. at 217-18. *Mills* has no application here, where the outcome on remand will not be known until after trial.

by changing the standard of proof at trial from scienter to negligence.[7]

Because reversal would not determine the outcome of Appellants' WSSA claims, this case is not like the three "category 4" cases that Appellants cite.[8] For instance, in *Southland Corporation* v. *Keating*, 465 U.S. 1, 6-7 (1984), this Court allowed the appeal in part because "reversal of a state-court judgment in this setting will terminate litigation of the merits of this dispute."

Hudson Distributors, Inc. v. *Eli Lilly & Co.*, 377 U.S. 386 (1964), also involved a dispositive issue on appeal. That case was a suit by a retailer to invalidate a state fair trade act on federal antitrust grounds. The Ohio Supreme Court upheld the statute, and remanded for enforcement proceedings. This Court accepted review, noting that the issues still pending in the Ohio courts were separate from the validity of the statute. *Id.* at 389 n.4. If this Court had reversed the Ohio Supreme Court, and invalidated the statute, the remanded state court proceedings to enforce the statute would have been terminated.

Mercantile National Bank v. *Langdeau*, 371 U.S. 555 (1963), involved the assertion by two defendant national banks that a special federal venue statute immunized them from suit in Travis County, Texas. The Texas Supreme Court refused to enforce the federal venue statute, and remanded for trial. This Court accepted review, stating that the venue issue was "a separate and independent matter, anterior to the merits and not enmeshed in the factual and

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[7] The Haberman Appellants, in No. 87-1897, assert that reversal of the Washington Supreme Court "will likely result in summary disposition of this case and many of these related cases." This assertion is speculative and totally unsupported.

[8] These three cases, discussed *infra*, were cited only by the Haberman Appellants in No. 87-1897.

legal issues comprising the plaintiff's cause of action." *Id.* at 558. This Court then upheld the venue statute and reversed the Texas decision, thereby terminating the suit against the national banks in Travis County.

The case at bar does not fit the mold of these cases. The standard of proof issue that Appellants seek to bring before this Court is not dispositive of their WSSA claims. It is not an issue that is "separate and independent" from the merits of the underlying cause of action. The question of the standard of proof to be applied at trial is the very sort of interlocutory issue, "enmeshed in the factual issues comprising the plaintiff's cause of action," *id.* at 558, that should await trial before being reviewed here. This appeal does not satisfy the requirement that reversal would preclude further litigation. This appeal should be dismissed.

B. Refusing Immediate Review Will Not Erode Federal Policy

The second element of the fourth *Cox* exception likewise is not satisfied here, since no serious erosion of federal policy will result if the Washington Supreme Court decision is allowed to stand pending trial. *Cox*, 420 U.S. at 483.

The standard of proof to be applied to Appellants' state law securities fraud claims does not affect the future conduct of third parties. This is not a case where first amendment rights will be chilled if the state decision is left unreviewed. *Cf. Cox*, 420 U.S. at 485-86.

Nor is this a case where a federal statutory scheme will be undetermined if an incorrect state supreme court decision is left standing. *Cf. Southland*, 465 U.S. at 6-7 (Federal Arbitration Act); *Hudson Distributors*, 377 U.S. at 395 (Sherman Act); *Mercantile National Bank*, 371 U.S. at 558-62 (National Banking Act). The Washington Supreme Court decision merely requires Appellants to try their state

law securities claims under a scienter standard of proof—*consistent* with the federal securities scheme. *See Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 193 (1976) (scienter is an essential element of a federal securities fraud claim under § 10(b) of the Securities Exchange Act of 1934).

The resolution of Appellants' constitutional claims "can await final judgment without any adverse effect upon important federal interests. A contrary conclusion would permit the fourth [*Cox*] exception to swallow the rule." *Flynt* v. *Ohio*, 451 U.S. 619, 622 (1981). Since no federal policy will be undermined by allowing this case to go to trial before review is had here, this appeal should be dismissed.

CONCLUSION

Strict finality of the state court decision below is ordinarily required for an appeal to this Court. No recognized exception to that requirement applies here. This appeal should be dismissed for want of jurisdiction.

Respectfully submitted,

CAMDEN M. HALL*
STELLMAN KEEHNEL
DANIEL L. THIEME
Foster Pepper & Shefelman
1111 Third Avenue,
Suite 3400
Seattle, Washington 98101
(206) 447-4400
Attorneys for Appellee
The City of Seattle

*Counsel of Record

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